



FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

November 15, 2006

ADVANCE COPY VIA FACSIMILE TO (202) 328-9162

B. Holly Schadler, Esq. and Michael B. Trister, Esq.
Lichtman, Trister & Ross, PLLC
1666 Connecticut Avenue, N.W., Fifth Floor
Washington, DC 20009

RE: MUR 5634
Sierra Club, Inc.

Dear Ms. Schadler and Mr. Trister:

On November 9, 2006, the Federal Election Commission accepted the signed conciliation agreement and civil penalty submitted on your client's behalf in settlement of a violation of 2 U.S.C. § 441b(a), a provision of the Federal Election Campaign Act of 1971, as amended. Accordingly, the file has been closed in this matter.

Documents related to the case will be placed on the public record within 30 days. *See* Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). Information derived in connection with any conciliation attempt will not become public without the written consent of the respondent and the Commission. *See* 2 U.S.C. § 437g(a)(4)(B).

Enclosed you will find a copy of the fully executed conciliation agreement for your files. Please note that the civil penalty is due within 30 days of the conciliation agreement's effective date. If you have any questions, please contact me at (202) 694-1650.

Sincerely,

A handwritten signature in cursive script that reads "Susan L. Lebeaux".

Susan L. Lebeaux
Assistant General Counsel

Enclosure
Conciliation Agreement

26044151089

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)

) MUR 5634

Sierra Club, Inc.)

CONCILIATION AGREEMENT

This matter was initiated by a signed, sworn, and notarized complaint filed by Edmund A. Hamburger. The Federal Election Commission ("Commission") found probable cause to believe that Sierra Club, Inc. ("Respondent") violated 2 U.S.C. § 441b(a).

NOW, THEREFORE, the Commission and the Respondent, having duly entered into conciliation pursuant to 2 U.S.C. § 437g(a)(4)(A)(i), do hereby agree as follows:

I. The Commission has jurisdiction over Respondent and the subject matter of this proceeding, and this agreement has the effect of an agreement entered pursuant to 2 U.S.C. § 437g(a)(4)(A)(i).

II. Respondent has had a reasonable opportunity to demonstrate that no action should be taken in this matter.

III. Respondent enters voluntarily into this agreement with the Commission.

IV. The pertinent facts in this matter are as follows:

1. Respondent is a corporation within the meaning of 2 U.S.C. § 441b(a).

2. The Federal Election Campaign Act of 1971, as amended ("the Act"), prohibits a corporation from making any contribution or expenditure, including independent expenditures, in connection with any federal election. See 2 U.S.C. § 441b(a).

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1 3. An independent expenditure is defined as an expenditure by a person, including a
2 corporation, "expressly advocating the election or defeat of a clearly identified candidate that is
3 made without cooperation or consultation with any candidate, or any authorized committee or
4 agent of such candidate, and which is not made in concert with, or at the request or suggestion of,
5 any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. § 431(17).

6 4. "Clearly identified" is defined at 2 U.S.C. § 431(18) as "(A) the name of the
7 candidate involved appears; (B) a photograph or drawing of the candidate appears; or (C) the
8 identity of the candidate is apparent by unambiguous reference."

9 5. The definition of express advocacy is set forth in the Commission's regulations at
10 11 C.F.R. § 100.22. The first part of this regulation defines "expressly advocating" as a
11 communication that uses phrases such as, among other things, "vote Pro-Life," or "vote Pro-
12 Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-
13 Choice. 11 C.F.R. § 100.22(a). This particular example was derived from the facts of *FEC v.*
14 *Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986), where the Supreme Court held that
15 such language was "in effect an explicit directive" to vote for the identified candidates.

16 6. The second part of this regulation encompasses a communication that, when taken
17 as a whole or with limited reference to external events, "could only be interpreted by a reasonable
18 person as containing advocacy of the election or defeat of one or more clearly identified
19 candidate(s) because" it contains an "electoral portion" that is "unmistakable, unambiguous, and
20 suggestive of only one meaning" and one as to which "reasonable minds could not differ as to
21 whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or
22 encourages some other kind of action." 11 C.F.R. § 100.22(b).

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1 7. Prior to the November 2, 2004 general election, Respondent produced and
2 distributed a pamphlet entitled "Let your Conscience be your Guide" ("Conscience") containing
3 text and photographs, as described in Paragraphs 8 through 10 of this agreement.

4 8. The "Conscience" pamphlet prominently exhorts the reader to "LET YOUR
5 CONSCIENCE BE YOUR GUIDE ...," accompanied by pictures of gushing water, picturesque
6 skies, abundant forests, and people enjoying nature. The heading of the interior of the pamphlet
7 exhorts the reader, "AND LET YOUR VOTE BE YOUR VOICE" (Emphasis in the original).

8 9. Underneath that exhortation, the pamphlet compares the environmental records of
9 President Bush and Senator John Kerry and U.S. Senate candidates Mel Martinez and Betty
10 Castor through checkmarks and written narratives. For example, in the category of "Toxic Waste
11 Cleanup," it describes Senator Kerry as a "leader on cleaning up toxic waste sites" and states he
12 co-sponsored legislation that would unburden taxpayers and "hold polluting companies
13 responsible for paying to clean up abandoned toxic waste sites." In contrast, the description of
14 President Bush's record on the same subject says "President Bush has refused to support the
15 'polluter pays' principle, which would require corporations to fund the cleanup of abandoned
16 toxic waste sites, including the 51 in Florida. Instead, he has required ordinary taxpayers to
17 shoulder the cleanup costs." Similarly, under the subject of "Clean Air," Senator Kerry is
18 described "support[ing] an amendment that would block President Bush's change to weaken the
19 Clean Air Act," and as co-sponsoring legislation "which would force old, polluting power plants
20 to clean up." In contrast, President Bush's position on "Clean Air" is described as "weakening
21 the law that requires power plants and other factories to install modern pollution controls when
22 their plants are changed in ways that increase pollution." In each of three categories, the

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1 pamphlet assigns a "checkmark symbol" in one or two boxes next to either one or both
2 candidates; of the two candidates, only Senator Kerry receives checkmarks in every box in all
3 three categories (Toxic Waste Cleanup, Clean Air, and Clean Water), whereas President Bush
4 receives only one checkmark in a single category (Clean Air), and in that category, there are two
5 checkmarks for Senator Kerry.

6 10. To the right of the comparisons between Senator Kerry and President Bush, the
7 "Conscience" pamphlet compares the environmental records of U.S. Senate candidates from
8 Florida, Mel Martinez and Betty Castor, in three categories. Ms. Castor's environmental record
9 in all three categories is accompanied by a checkmark in all three boxes next to her position. In
10 the "toxic waste cleanup" category, the pamphlet states "Castor supports reinstating the 'polluter
11 pays' principle to make corporate polluters, not U.S. taxpayers, pay to clean up abandoned toxic
12 waste sites." In the "clean air" category, it states "Castor has pledged to address air pollution by
13 placing caps on carbon dioxide, sulfur dioxide, nitrogen oxide, mercury and other dangerous
14 emissions." Finally, Ms. Castor's record in the "energy" category is described as supporting "a
15 greater commitment to alternative energy, such as wind and solar power and greater use of
16 'green' building practices." In contrast, Mr. Martinez does not receive any checkmarks. In the
17 "toxic waste cleanup" and "clean air" categories, Respondent stated that for Mr. Martinez there
18 was "no stance on record." Mr. Martinez's record in the "energy" category is described as
19 "support[ing] the Energy Policy Act of 2003, which gave millions in subsidies to the oil and coal
20 industries, but made minimal investments in clean alternative energy technologies." The
21 pamphlet concludes with: "Find out more about the candidates before you vote. Visit
22 www.sierraclubvotes.org."

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1 11. The Commission concludes that the "Conscience" pamphlet provided "in effect"
2 an explicit directive to vote for Senator Kerry and Betty Castor, because it contains language—
3 "LET YOUR CONSCIENCE BE YOUR GUIDE ... AND LET YOUR VOTE BE YOUR
4 VOICE"—exhorting readers to vote for the candidates clearly favored by the Sierra Club as
5 expressed through the checkmarks and accompanying narratives, *see* 11 C.F.R. § 100.22(a), and
6 that the communication was unmistakable, unambiguous, and suggestive of only one meaning,
7 and reasonable minds could not differ as to whether the pamphlet encourages readers to vote for
8 Senator Kerry and Betty Castor or encouraged some other kind of action. *See* 11 C.F.R.
9 § 100.22(b). Accordingly, the Commission concludes that the "Conscience" pamphlet expressly
10 advocated the election of clearly identified candidates.

11 12. The "Conscience" pamphlet was made without cooperation or consultation with
12 any candidate, or any authorized committee or agent of such candidate, and was not made in
13 concert with, or at the request of, any candidate, or any authorized committee or agent of such
14 candidate.

15 13. Respondent paid \$69,771.45 in corporate treasury funds to produce and
16 distribute the "Conscience" pamphlet.

17 14. Respondent contends that it distributed the "Conscience" pamphlet in the good
18 faith belief that it did not contain express advocacy under 11 C.F.R. §§ 100.22(a) or (b), and did
19 not constitute a corporate expenditure prohibited by 2 U.S.C. § 441b(a).

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V. Solely for the purpose of settling this matter expeditiously and avoiding litigation, and without admission with respect to any other proceeding, Respondent will not further contest the Commission's probable cause finding that it violated 2 U.S.C. § 441b(a) and will cease and desist from violating 2 U.S.C. § 441b(a) as described herein.

VI. Respondent will pay a civil penalty to the Federal Election Commission in the amount of Twenty Eight Thousand dollars (\$28,000), pursuant to 2 U.S.C. § 437g(a)(5)(A).

VII. The Commission, on request of anyone filing a complaint under 2 U.S.C. § 437g(a)(1) concerning the matters at issue herein or on its own motion, may review compliance with this agreement. If the Commission believes that this agreement or any requirement thereof has been violated, it may institute a civil action for relief in the United States District Court for the District of Columbia.

VIII. This agreement shall become effective as of the date that all parties hereto have executed same and the Commission has approved the entire agreement.

IX. Respondent shall have no more than 30 days from the date this agreement becomes effective to comply with and implement the requirements contained in this agreement and to so notify the Commission.

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1 X. This Conciliation Agreement constitutes the entire agreement between the
2 parties on the matters raised herein, and no other statement, promise, or agreement, either written
3 or oral, made by either party or by agents of either party, that is not contained in this written
4 agreement shall be enforceable.

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6 FOR THE COMMISSION:
7 Lawrence H. Norton
8 General Counsel

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11 BY: Rhonda J. Vording by UC
12 Rhonda J. Vording
13 Associate General Counsel
14 for Enforcement

11/15/2006
Date

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18 FOR THE RESPONDENT:

19
20
21 Laura Hoehn
22 (Name) Laura Hoehn
23 (Position) General Counsel
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Oct. 30, 2006
Date

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OFFICE OF
GENERAL COUNSEL
SIERRA CLUB